Supreme Court, U.S.
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No. 96-782

In The

Supreme Court of the United States

October Term, 1996

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, AND LOIS PARDUE,

Petitioners,

v.

NANCY BUTLER, individually,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

December 20, 1996

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STATEMENT OF THE CASE

1. FACTS. On July 1, 1991, Max Cole was brought from the Marion County lock-up to Wishard and was seen by Wishard Crisis Intervention Unit personnel at the hospital's emergency room. Reportedly, Mr. Cole had been hitting his head against a wall at the jail and had been in a fight with another inmate. (R. 54, Exh. 3. ¶ 14.) Mr. Cole was assessed by Dr. Alan Schmetzer, who recommended that the patient be returned to jail. (R. 54, Exh. 3, ¶¶ 14-15.)

Mr. Cole became agitated and tried to leave the emergency room. Dr. Verkota Rao reevaluated Mr. Cole and determined he was experiencing symptoms of a drug-induced psychosis and admitted Mr. Cole to BU2. Dr. Rao placed Mr. Cole on potential assault, suicide and elopement precaution. (R. 63, p. 75.)

At the time of Mr. Cole's admission to Wishard, Dr. Nancy Butler was the Medical Director of Inpatient Psychiatry and Staff Psychiatrist with Midtown Mental Health Center, a division of Wishard Hospital. (R. 63, p. 5.) Dr. Butler has been a Board certified psychiatrist since 1986. (R. 63, Defts. Exh. "A".)

Dr. Butler first saw Mr. Cole on July 2, 1991. After reviewing his chart and conducting a mental status examination of the patient, it was her opinion that Mr. Cole was not currently contemplating suicide and was not in need of any change in precautions assigned by Dr. Rao. (R. 63, pp. 80-82.) Dr. Butler did not believe that Mr. Cole was a "high risk" patient, even though Mr. Cole reported that he heard voices telling him to commit suicide,

because Mr. Cole did not express a present intent to commit suicide. (R. 63, pp. 36-38.)

Dr. Butler again saw Mr. Cole on July 3, 1991. His behavior was deemed to be consistent with a patient suffering from drug-induced psychosis. It was Dr. Butler's opinion that there was no need for a change in Mr. Cole's precautions on July 3, 1991. Mr. Cole spoke logically and was coherent, but did suffer from paranoid ideations and auditory hallucinations. (R. 63, p. 36.)

Dr. Butler did not personally see Mr. Cole after July 3, 1991. Mr. Cole was seen by Dr. Schmetzer on July 4, 1991, who maintained the precautions previously assigned. Mr. Cole was discovered to have committed suicide on July 4, 1991 at approximately 11:00 p.m. by suffocating himself with the liner from the linen hamper. (R. 58, pp. 32-34.) The linen hampers were lined with plastic sanitary bags to comply with Wishard's infectious disease control policy, which was developed to comply with regulations promulgated by the Indiana State Board of Health. (R. 54, Exh. 3, ¶¶ 4, 5.)

Dr. Butler had no knowledge that there were plastic bags in the linen hampers at Wishard Hospital. (R. 63, p. 88.) No patient had, to her knowledge, ever attempted to harm himself using a plastic bag from the Unit. (R. 63, p. 88.)

2. CASE HISTORY. Plaintiffs brought suit against Dr. Butler and several nurses under 42 U.S.C. § 1983, for knowingly disregarding a substantial risk of death to Mr. Cole. The Defendants moved for summary judgment, which was granted on November 27, 1995. The Seventh

Circuit Court affirmed. Plaintiffs are seeking a *writ of certiorari* solely to pursue their claims against Dr. Butler.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's ruling does not totally prohibit prisoners and pre-trial detainees from presenting expert testimony to challenge a prison doctor's denial of deliberate indifference.

This Court's decision in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994) specifically rejected an objective test for "deliberate indifference" and held that liability will be established only if

> "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the indifference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

Id. at 1979.

Nothing in the Seventh Circuit's opinion in this case, nor this Court's opinion in *Farmer*, prohibits the use of expert testimony to create a material issue of fact regarding deliberate indifference on the part of prison doctors. In fact, this Court in *Farmer* explained that

> "whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual way, including inference from circumstantial evidence, and a factfinder may conclude that a

> prison official knew of a substantial risk from the very fact that the risk was obvious."

114 S.Ct. at 1981. *(Citations omitted.)*

Dr. Butler made a medical judgment and placed Mr. Cole on the lower of the two levels of suicide precautions. Therefore, by her diagnosis, Dr. Butler made the *subjective* determination that there was not a "substantial risk of serious harm" to Mr. Cole. Such decision has not been challenged by the Plaintiffs.

The Plaintiffs presented evidence by Affidavit of Dr. Larry Davis that the use of plastic bags in the Unit created a substantial risk of serious harm to "potential suicide" patients such as Mr. Cole, and that such a risk was "obvious".

The Plaintiffs have mischaracterized the Seventh Circuit's holding in this case as having created an exception in cases involving prison doctors to the rule set forth in *Farmer*. The Seventh Circuit correctly applied the law as set forth in *Farmer* and held that since the Plaintiffs had not challenged the "appropriateness" of Mr. Cole's diagnosis, Dr. Davis's testimony regarding the "obviousness" of the risk was in conflict with Dr. Butler's subjective medical judgment. Therefore, the Plaintiffs could not establish that Dr. Butler was deliberately indifferent to Mr. Cole's serious medical needs.

The Seventh Circuit did not hold that in all cases involving a prison doctor's denial of deliberate indifference, expert evidence would not be allowed to permit the inference of subjective knowledge from the objective fact that the risk was obvious. However, as the law was

correctly applied to the peculiar facts of this case, the expert evidence was insufficient.

2. The Seventh Circuit's ruling that the Plaintiffs' expert evidence presented was insufficient to create a genuine issue of material fact regarding whether Dr. Butler was subjectively aware that Mr. Cole intended to commit suicide is not in conflict with the decisions of the Eighth and Eleventh Circuits.

The Plaintiffs read the Seventh Circuit's opinion in this case as conflicting with those decided by the Eighth and Eleventh Circuits. The Plaintiffs cite *Miller v. Schoenen*, 75 F.3d 1305 (8th Cir. 1996) as support for their contention that other Circuits have allowed prisoners, pursuing claims under the Eighth Amendment, to challenge the doctor's denial of deliberate indifference by expert testimony. Even assuming the ruling in the Seventh Circuit was intended to restrict the methods of proof, the case cited by the Plaintiffs differs significantly on the facts.

In *Miller*, the plaintiff alleges specific inadequacies in his specialized medical care. Expert testimony on the specialized care needed by transplant patients and the inadequacy of the care received by the patient was enough to allow a reasonable jury to conclude that the patient had particular needs and the doctors failed to provide the specialized care.

Had the Plaintiffs challenged the appropriateness of Dr. Butler's classification, expert evidence on the obviousness of such misclassification may have been sufficient to allow the jury to make an inference that Dr.

Butler knew of the substantial risk of harm to Mr. Cole and subjectively disregarded that risk by failing to take reasonable measures to abate it. Such is not the case.

The Plaintiffs cite the Eleventh Circuit case of *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996) as conflicting with the Seventh Circuit's holding. Again, the Seventh Circuit's holding in this case does not preclude prisoner plaintiffs to prove by expert evidence that the prison doctors acted with "deliberate indifference". Therefore, it is not inconsistent with the Eleventh Circuit's holding.

The Plaintiffs assert as additional support for granting their *writ* that under the Seventh Circuit's rule, prison doctors have achieved near total immunity from constitutional liability. The cases cited by the Plaintiffs address the distinction between "negligent treatment" and "deliberate indifference", and do not allow the constitutionalization of medical malpractice. *See*: *Snipes v. Detella*, 95 F.3d 586, 591 (7th Cir. 1996); *Steele v. Choi*, 82 F.3d 175, 178 (7th Cir. 1996), *cert. denied*, ___ S.Ct. ___ (1996). This Court has clearly held that merely negligent care would not rise to the level of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 291-92 (1976).

Farmer set forth a stringent standard of proof for "deliberate indifference", but not one that is impossible to meet. There is no need for this Court to accept this case, as it has already been held that incarcerated individuals are entitled to the same usual methods of proof available to all other citizens. The Seventh Circuit has correctly applied the law as set forth in *Farmer* to the facts of this case and its ruling is not inconsistent with those of other circuits.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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